Protection & Advocacy, Inc.

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TO: Hon. Roger W. Boren, Chair
Probate Conservatorship Task Force

FROM: Eric Gelber, Managing Attorney, Protection & Advocacy, Inc.

RE: **Testimony Presented to Probate Conservatorship Task Force: Improving the Practices and Procedures of Probate Conservatorship Cases—*Part I:* A Fresh Look at Temporary Conservatorships**

DATE: March 17, 2006

The concept of conservatorships is, in many ways, anachronistic and antithetical to current ways of viewing disability and the principles and values embodied in approaches to providing services and supports to people with disabilities. Current approaches focus on self-determination, person-centered planning, and autonomy in decision making. This approach recognizes that, with natural and professional supports, people with disabilities are capable of expressing preferences, and making choices in all aspects of their lives, including where and with whom they live and work and the types of services and supports they want and need.

When a conservatorship, temporary or permanent, is sought for people with disabilities, it often means either that old stereotypes about the capabilities of even people with significant cognitive or mental disabilities die hard or that there has been a failure to take advantage of less intrusive alternatives that would have obviated the need for such urgent or extreme measures.

For the clients we serve, the establishment of a conservatorship has major consequences for their self esteem and feelings of self worth. Having a conservator reinforces the perception that others are in control of their lives. We were asked to identify people with disabilities who had conservators to participate

on these panels but were unsuccessful. The most frequent reason the people we approached gave for declining to participate was that they feared retribution if they were to say anything that would upset their conservators.

With respect to the issues we were asked to address, I would offer the following:

We support the reforms with respect to temporary conservatorships described in AB 1363, currently making its way through the Legislature. Specifically, we support the accountability measures that would require tracking of the number of temporary conservatorships requested and the number granted, noting the number in which notice was waived. It was particularly disturbing to read in the LA Times series that adults are not formally notified in more than half the cases involving temporary conservatorships and that judges readily dispensed with the requirement based on representations that the individuals were too feeble to come to court.

One of the rallying cries of the disability rights movement is "nothing about us without us." People should not be denied the opportunity to participate in proceedings that will potentially deprive them of basic rights and autonomy. Notice must be required in all cases in which it is feasible. AB 1363 would require adoption of a rule of court to establish standards for good cause exceptions to the notice requirements, limiting exceptions to only cases when waiver of notice is essential to protect the proposed conservatee or his or her estate from irreparable harm.

AB 1363 would also *require* that the proposed conservatee attend the hearing to establish the temporary conservatorship in the absence of very limited exceptional circumstances. It would also *require* that prior to the hearing, or if not feasible, within 48 hours after the hearing, the court investigator interview the proposed conservatee personally to determine, among other things, if the person wants to oppose the conservatorship or has a preference for who would be appointed.

AB 1363 would *require* in any case in which there is a proposal to change the temporary conservatee's residence, that absent good cause, the court investigator must personally interview the conservatee and make determinations regarding the conservatee's views on the subject, whether he or she wants to be represented by counsel and to determine whether the proposed change in residence is required to prevent irreparable harm. The bill would *require* that the court hold a hearing on the request.

In addition to the reforms proposed by AB 1363, there is a need for preventative measures to ensure that potential alternatives to conservatorship are available. These measures would, in some instances, require involvement by already-responsible agencies and, in other instances, legislative reforms to expand the availability of alternative resources.

Many people can, in fact, make complex decisions with assistance. Such assistance can enable people who might otherwise need a conservator to make decisions without the need to appoint even a temporary conservator. These include, for example, case management services, trained facilitators, and independent advocacy services. These potential sources of assistance already exist for many people, particularly people with developmental disabilities. But judges, as well as attorneys and investigators involved in the conservatorship process need to be better trained so that they are aware of these potentially available sources of services and supports that would in many instances prevent the need to establish conservatorships.

Finally, on a, perhaps, outside-the-box but related subject, the law related to capacity and informed consent needs to be clarified legislatively to specifically acknowledge that, even people who may not have the capacity to make decisions concerning complex finances, complex medical issues, and other matters, nonetheless have the ability to designate authorized agents, through powers of attorney and advanced healthcare directives. In other words, capacity should be viewed on a continuum and people with cognitive or mental disabilities should at least have the opportunity to have a say as to whom they trust and to express these preferences in advance of the emergency that would otherwise lead to the appointment of a conservator.

Biographical Information
Eric R. Gelber

Eric Gelber is the Managing Attorney in the Sacramento office of Protection & Advocacy, Inc. (PAI), a federally mandated non-profit agency established in 1978 to advocate on behalf of Californians with disabilities. He has been with PAI since 1982 representing clients on a wide range of issues, including: Access to regional center and special education services; discrimination under the Americans with Disabilities Act and state and federal fair housing laws; and enforcement of the right under state and federal law to live and receive services in integrated, community-based settings.

From 1990 to 1992 he served as an appointed member of the State Judicial Council Advisory Committee on Conservatorships, which advised the Judicial Council on issues related to conservatorships and developed the *Handbook on Conservatorships*. He is also engaged in legislative advocacy and conducts trainings for consumers, advocates, family members, and service providers on a wide range of disability-related topics. He is the parent of an adult daughter with a developmental disability.

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March 23, 2006

Hon. Roger W. Boren, Chair
Probate Conservatorship Task Force
Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688
Attn: Susan Reeves

Re: Written Comments of Protection and Advocacy - Improving the Practices and Procedures of Probate Conservatorship Cases.

Dear Justice Boren:

Protection and Advocacy, Inc. (PAI) is a private non-profit agency established under federal law to protect, advocate for and advance the human, legal and service rights of Californians with disabilities.[1] Please accept the following comments for consideration by the Probate Conservatorship Task Force as they move forward with evaluating, and developing recommendations to improve, the practices and procedures of probate conservatorship cases. These comments include but also expand on the testimony we provided on temporary conservatorships at the Task Force's March 17, 2006 hearing in Los Angeles. For convenience's sake, we have structured our comments according to the agenda used in the recent public hearings.

[1] PAI provides services pursuant to the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §15001, PL 106-402; the Protection and Advocacy for Mentally Ill Individuals Act, 42 U.S.C. §10801, PL 106-310; the Rehabilitation Act, 29 U.S.C. §794e, PL 106-402; the Assistive Technology Act, 29 U.S.C. §3011,3012, PL 105-394; the Ticket to Work and Work Incentives Improvement Act, 42 U.S.C. §1320b-20, PL 106-170; the Children's Health Act of 2000, 42 U.S.C. §300d-53, PL 106-310; and the Help America Vote Act of 2002, 42 U.S.C. §15461-62, PL 107-252.

TEMPORARY CONSERVATORSHIPS

I. Need for Accountability Measures.

With regard to temporary conservatorships, we support reforms like those proposed in AB 1363, currently making its way through the Legislature. Specifically, we support the establishment of accountability measures that would require tracking of at least: (1) the number of permanent conservatorships requested and the number granted, noting the number in which notice was waived, (2) the number in which the proposed conservatee attended the hearing; (3) the number of contested hearings; and (4) the "type" of conservator being proposed (i.e. family member, professional, public guardian.). It was disturbing to read in the LA Times series that individuals are not formally notified in more than half the cases involving temporary conservatorships and that judges will readily dispense with the notice requirement when provided the unconfirmed assurances of a proposed conservator that the proposed conservatee is too feeble to come to court.

II. Need for Due Process Protections.

One of the rallying cries of the disability rights movement is "nothing about us without us." People should not be denied the opportunity to participate in proceedings that will potentially deprive them of basic rights and autonomy. Accordingly, we support reforms related to a conservatee's right to receive notice of, and attend any and all conservatorship proceedings. AB 1363 proposes such reforms, as set out below.

Notice *must be required* in all cases in which it is feasible. AB 1363 would require adoption of a rule of court to establish standards for good cause exceptions to the notice requirements; limiting such exceptions to cases where waiver of notice is essential to protect the proposed conservatee or his or her estate from irreparable harm.

AB 1363 would also *require* that the proposed conservatee attend the hearing to establish the temporary conservatorship in the absence of very limited exceptional circumstances. It would also *require* that prior to the hearing, or if not feasible, within 48 hours after the hearing, the court investigator interview the proposed conservatee personally to determine, among other things, if the person wants to oppose the conservatorship or has a preference for who would be appointed.

AB 1363 would *require* in any case in which there is a proposal to change the temporary conservatee's residence, that absent good cause, the court investigator must

personally interview the conservatee and make determinations regarding the conservatee's views on the subject, whether he or she wants to be represented by counsel and to determine whether the proposed change in residence is required to prevent irreparable harm. The bill would *require* that the court hold a hearing on the request.

PERMANENT CONSERVATORSHIPS

I. Need for Accountability Measures.

We support the establishment of accountability measures, like those proposed in AB 1363, that would require tracking of at least: (1) the number of permanent conservatorships requested and the number granted, noting the number in which notice was waived, (2) the number in which the proposed conservatee attended the hearing; (3) the number of contested hearings; and (4) the "type" of conservator being proposed (i.e. family member, professional, public guardian). The collection and analyzing of such data is essential from a quality assurance standpoint, and will help identify problems and trends within the system.

II. Need to Improve the Frequency and Quality of Conservatorship Reviews.

We support reforms that would require more frequent reviews of conservatorships at *noticed* hearings and that would require conservators and guardians to present annual, rather than biennial, accountings. Increasing the frequency of such reviews will improve the chances of identifying and addressing conservator abuses earlier. AB 1363 proposes such reforms, as well as a related accountability measures that would track the number of accountings filed late and report such data to the Judicial Council.

Court investigators' evaluations should be required to include assessment of (at a minimum) the appropriateness of a conservatee's placement, a conservatee's quality of care, and a conservatee's financial condition. Appropriateness, for purposes of such evaluations must be defined to take into account least restrictive measures and alternatives, as well as a conservatee's desires and values. Requiring that such factors be taken into consideration is consistent with the spirit of anti-discrimination laws and the concepts of inclusion, integration and self-determination.

Specifically with regard to the review of a conservatee's financial situation, courts and investigators must ensure the prompt and effective review of filed accountings. This will, in part, require the hiring and training of additional court investigators or accounting specialists (see below).

III. Need for Additional Staff.

The LA Times' series reported that in 1995, 1,024 new conservatorship cases were filed in Los Angeles County. Last year, the number was 1,408, a 38% increase. Yet the number of court investigators — 10 — is the same as it was a decade ago! This inadequate staffing has resulted in a backlog in needed home visits--which are currently required a year after someone has been placed under a conservatorship and then every two years but, as noted above, is something we believe needs to happen even more frequently--and in the inability of probate attorneys to keep up with the financial reports in which conservators must account for conservatees' money. To rid this backlog of financial reports, many questionable expenses and payments have been rubber-stamped or otherwise gone unnoticed, opening the door to financial abuse.

IV. Need to Establish Safeguards with Regard to the Sale of Homes and Placement Changes.

In addition to increasing the number and quality of reviews, we support the establishment of additional safeguards to protect conservatees from major events – such as the sale of a conservatee's home and/or a change in living arrangement. For persons with disabilities living independently, it is relatively easy for conservators to sell their property and move them to facilities and institutions - to make it more convenient for the conservator. Moreover, conservatees routinely have their preference in living arrangement ignored.

Prior to the sale of real property of a conservatee and placement of the conservatee in a group home, nursing facility, or other residential care facility, conservators should be required to explore less restrictive alternatives to a facility placement, including but not limited to an at-home placement for the conservatee with necessary services and supports. Moreover, conservators should be required to document in writing all alternative placements explored, along with the rationale behind not pursuing/securing those placements. Conservators should also document, in writing, any efforts made to secure the services and supports that would allow their conservatees to remain in the community and/or in their family home, such as in-home support services, regional center services, mental health services, medical and mental health rehabilitation services, home and community-based waivers and alternative property financing methods.

V. Need to License, Educate and Train.

Standardizing the educational and training requirements for potential conservators is also a necessary part of conservatorship reform. This is particularly true in the case of

professional conservators, for whom there are virtually no standards - educational, ethical or otherwise. To provide the level of quality assurance necessary to protect conservatees from unscrupulous individuals, we support such reforms as: (1) requiring the licensing of professional conservators; (2) the establishment and administration of a licensing program for professional conservators and guardians; (3) the establishment of an ombudsman's office to collect and analyze data related to complaints about conservatorships; (4) the development of a conservator's code of ethics; and (5) the establishment of a committee that would take disciplinary action against conservators, and/or make referrals to the Attorney General for violations of law and/or the breaching of a fiduciary duty. AB 1363 proposes such reforms. There should be no "grandfathering" of current professionals. The L.A. Times series makes it clear that reforms are necessary to address problems with many of those currently practicing.

Finally, counties should be required to start using the *existing* statewide registry to track abusive and inept conservators. If the utilization of the registry is currently too difficult or burdensome – than some other tracking mechanism needs to be developed. Else, we will continue to see abusive conservators moving and working from county to county without detection or penalty.

IMPROVING THE SYSTEM GENERALLY

The concept of conservatorships is, in many ways, anachronistic and antithetical to modern views on disability and the basic principles upon which California's service delivery model to persons with disabilities is based: self-determination, person-centered planning, and autonomy in decision making. Accordingly, the pursuit of a conservatorship, whether temporary or permanent, is a measure that should only be undertaken in the most urgent or extreme of circumstances, and even then, only after less intrusive alternatives have been fully explored.

California's service delivery model recognizes that with natural and professional supports, people with disabilities are capable of expressing preferences and making choices in all aspects of their lives, including where and with whom they live and work and the types of services and supports they want and need. The laws, policies, practices and procedures applicable to conservatorships must necessarily recognize the same. Accordingly, the following reforms and measures are also recommended.

I. Need to Educate Court Personnel.

Many people can, in fact, make complex decisions with assistance. Such assistance can enable people who might otherwise need a conservator to make decisions without the need to appoint even a temporary conservator. These include, for example, case

management services, trained facilitators, and independent advocacy services. These potential sources of assistance already exist for many people, particularly people with developmental disabilities. But judges, as well as attorneys and investigators involved in the conservatorship process, need to be better trained so that they are aware of these potentially available sources of services and supports that would in many instances prevent the need to establish conservatorships.

II. Need for Preventative Measures – Availability of Alternatives.

In addition to the proposed reforms discussed above, there is a need for preventative measures to ensure that less restrictive alternatives to conservatorship, both temporary and permanent, are available. Such measures would, in some instances, require involvement by already-responsible agencies and, in other instances, legislative reforms to expand the availability of alternative resources.

III. Clarification of the Laws Pertaining to Capacity and Informed Consent.

On a related but perhaps outside-the-box subject, the law related to capacity and informed consent needs to be clarified legislatively to specifically acknowledge that, even people who may not have the capacity to make decisions concerning complex finances, complex medical issues, and other matters, may nonetheless have the ability to designate authorized agents, through powers of attorney and advanced healthcare directives. In other words, capacity should be viewed on a continuum and people with cognitive or mental disabilities should at least have the opportunity to have a say as to whom they trust and to express these preferences in advance of the emergency that would otherwise lead to the appointment of a conservator.

IV. The Issue of Costs.

We are aware that the reforms we and others propose would impose additional costs on an already under-funded system. A recurring theme of others providing input to the Task Force is that: We are in favor of proposals for reform but the money isn't there. If the Task Force is to accomplish anything meaningful, it must not let cost be the overriding or determinative factor in its recommendations. From the standpoint of those whose lives and basic rights are most directly impacted, fiscal costs to state and local government must be balanced with the costs to these individuals' fundamental interests in personal autonomy, human dignity and, even, liberty. We hope the Task Force will propose real reform and let state and local legislative bodies determine what priority is to be given to safeguarding the interests of those whose rights and quality of life are at stake.

Thank you for the opportunity to submit these comments. Please feel free to contact me should you have any question or concerns.

Sincerely,

Michelle Uzeta
Associate Managing Attorney